

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KURTIS R. BRAGG,

Defendant-Appellant.

UNPUBLISHED

December 13, 2005

No. 255121

Wayne Circuit Court

LC No. 03-010202

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of manslaughter with a motor vehicle, MCL 750.321, and sentenced to three to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant's conviction arises from the tragic death of Canton Police Officer Gordon L. Stevens on July 23, 2003. Defendant and two coworkers, who were on a business assignment in Michigan from Kentucky, spent the afternoon socializing at a restaurant and later at a strip club. Defendant consumed at least two beers and three shots of alcohol before taking his coworkers to "jump train tracks" in a rented white Pontiac Grand Prix. Defendant drove down Lotz Road, a dirt and gravel road, at a high rate of speed and came close to striking a twelve-year-old boy riding a bicycle. The boy managed to move off the road and was struck only by flying gravel when the Grand Prix passed. After passing the boy, defendant continued toward the railroad tracks at a high rate of speed. The road approaching the tracks inclined upward, prohibiting defendant from seeing beyond the railroad tracks. An accident reconstructionist testified that the Grand Prix was traveling at between eighty-one and eighty-nine miles an hour when it hit the third or fourth rail of the tracks and became airborne.¹ The car tilted forward or nose dived as it came down out of the air. Officer Stevens's patrol car was parked on the side of the road, on the other side of the tracks. He was investigating an abandoned vehicle in the area. The Grand Prix hit the patrol car in the center rear, pushing the vehicle into a field and partially ejecting Officer Stevens through a window. Officer Stevens died from the multiple injuries sustained in the

¹ There was no posted speed limit on Lotz Road and thus, fifty-five miles an hour was the legal speed.

accident. Defendant's coworkers were also injured; one sustained a fractured femur and another other broke both arms and his left orbital bone, which caused a loss of sight in one eye. Defendant also suffered injuries in the crash. Defendant's blood was drawn approximately three hours after the crash, and his blood alcohol level was .04 at that time.

Defendant first argues on appeal that the nineteen to thirty-eight month minimum sentence range under the legislative guidelines was improperly calculated because he was assessed twenty-five points for offense variable (OV) 3, MCL 777.33. The issue is properly preserved for our review because defendant objected to the scoring of OV 3 before sentencing. MCL 769.34(10). A sentencing court has discretion with respect to the scoring of the offense variables, provided that the evidence of record supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

MCL 777.33 provides, in relevant part:

(1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

One hundred points should be scored if the victim was killed, MCL 777.33(1)(a), unless the sentencing offense is a homicide, MCL 777.33(2)(b). Twenty-five points is to be scored if a victim suffers a life threatening or permanent incapacitating injury. MCL 777.33(1)(c).

In this case, the trial court scored OV 3 at twenty-five points after referencing the loss of sight suffered by one of defendant's coworkers in the accident. On appeal, defendant argues that OV 3 could not be scored based on injuries to anyone other than Officer Stevens and that, because the variable could not be scored for Officer Stevens, zero was the appropriate score. Defendant argues that the term "victim" in the statute refers only to Officer Stevens. We disagree.

In *People v Albers*, 258 Mich App 578, 592-593; 672 NW2d 336 (2003), this Court determined that the term "victim" does not reference only the victim of the sentencing offense, but "includes any person harmed by the criminal actions of the charged party." *Id.* Thus, the injuries to defendant's coworkers were properly considered. Because there was information in the record that one of defendant's coworkers lost his eyesight in one eye as a result of the crash, we conclude that the trial court did not exceed its discretion in scoring OV 3 at twenty-five points on the basis of the coworker's injury.

Defendant argues that *Albers* was improperly decided and should be overruled on grounds of statutory construction. We are bound to follow the decision in *Albers*. MCR 7.215(J)(1). Moreover, we find it unnecessary to revisit or question that decision in this case because we can additionally affirm the scoring of twenty-five points for OV 3 on alternative grounds. Recently, in *People v Houston*, 473 Mich 399, 405-408; 702 NW2d 530 (2005), our Supreme Court considered the scoring of OV 3 in a situation where the only victim was shot and killed. In *Houston*, *supra* at 406, the Court stated that zero points should be scored under OV 3 "only when '[n]o physical injury occurred to the victim.'" Where physical injury occurs, and the

sentencing offense is a homicide, a score of ten or twenty-five points is appropriate. *Id.* Because the victim in *Houston* suffered a gunshot wound to the head, twenty-five points was properly scored even though the sentencing offense was a homicide. *Id.* at 407. Thus, *Houston*, also supports that a score of twenty-five points was appropriate for OV 3 in this case based on the injuries suffered by Officer Stevens in the car crash. A score of zero points for OV 3 was not an option for the trial court. *Id.* at 406. Because OV 3 was properly scored at twenty-five points, regardless of the reason for the score, there is no error requiring resentencing. *People v Lucas*, 188 Mich App 554, 577; 470 NW2d 460 (1991).

On appeal, defendant also argues that, when scoring the guidelines, the trial court engaged in judicial fact-finding in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). He argues that the sentencing guidelines should be rescored to omit all offense variable scores based on judicial fact-finding and, thereafter, he should be resentenced within the rescored guidelines range. We disagree. In *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), the Court indicated that *Blakely* is inapplicable to Michigan's indeterminate sentencing system. We are bound by that decision. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005). See also *People v Wilson*, 265 Mich App 386, 399; 695 NW2d 351 (2005).

Affirmed.

/s/ Helene N. White

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder